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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 869

NATIONAL BISCUIT DIVISION, ETC., *Petitioner*,

v.

BOYD LEEDOM, ET AL., INDIVIDUALLY AND AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

ABRAHAM J. HARRIS
JAMES H. HELLER
JOHN V. LONG
1626 Woodward Building
Washington 5, D. C.
Counsel for Petitioner

PERKS OF BYRON S. ADAMS, WASHINGTON, D. C.

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1. The Government relies heavily (Br. in Op., pp. 8-9) on the Board's decision in *Wade Manufacturing Company*, 100 NLRB 1135, to demonstrate that its so-called schism doctrine does not discriminate against expelled unaffiliated unions in violation of section 9(c)(2) of the Act.[1] The argument is deceptive. For whatever the factual situation was in *Wade Manufac-*

[1] The Brief in Opposition tacitly concedes (p. 8) that discrimination against unaffiliated unions would be such a violation.

turing and regardless of what the Board may there have held, the fact is that in the instant Nabisco cases, the Board relied solely on its *Lawrence Leather* (108 NLRB 546) doctrine (Pet., pp. 10-11), a rule whose very statement relies on disaffiliation and expulsion and thereby involves the proscribed discrimination (Pet., pp. 11-14). Moreover, *Wade Manufacturing* not only antedated *Lawrence Leather* by two years, but also was completely superseded by the latter case and never thereafter was relied upon by the Board.

It is thus completely beside the point whether the rule expounded in *Wade Manufacturing* violated section 9(c)(2) (Br. in Op., p. 9). The issue here is whether the *Lawrence Leather* schism doctrine as applied in these Nabisco cases resulted in such a violation. We submit that this question can be answered only in the affirmative.

In any event, Government counsel may not now defend the Board's action in these Nabisco cases on a ground entirely different from that stated therein by the Board itself. See *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U.S. 80, 95; *Securities and Exchange Commission* v. *Chenery Corporation*, 332 U.S. 194, 196.

2. It is disingenuous for the Government now to argue (Br. in Op., pp. 11-12) that by directing an election "in the face of an outstanding contract, the Board does not nullify or set aside the contract as such" but that the fate of the contract "is a question left for future proceedings and negotiations between the parties." How can this be squared with the Board's recent holding in *Hershey Chocolate Corporation*, 121 NLRB No. 124 (a decision upon which the Solicitor

General himself places considerable reliance (Br. in Op., pp. 7, 10)), that

> "in accord with established practice, we also believe that, in a representation proceeding, it would be inappropriate to require the winning union, if any, to assume the existing contract." (121 NLRB No. 124, mimeo dec., p. 13).

This is just the sort of Board nullification of contracts not in themselves violative of the policies of the Act against which this Court has often spoken. See Pet., p. 15, and cases there cited.

For the foregoing reasons and those set forth in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM J. HARRIS
JAMES H. HELLER
JOHN V. LONG
1026 Woodward Building
Washington 5, D. C.
Counsel for Petitioner